MOTIVE AS AN ELEMENT IN TORTS IN THE COMMON AND IN THE CIVIL LAW.

THERE is a growing body of authority in the French law in favour of the proposition that legal rights are not absolute. The maxims *Nullus videtur dolo facere qui jure suo utitur*,[1] and *feci sed jure feci* are no longer regarded with the same respect as formerly. It is now generally admitted that a person whose action is shown to have been merely malicious cannot shelter himself behind the plea that he was within his right. For no right extends to the permitting of one man to injure another unless there is some legitimate excuse for so doing.

As an owner of property, for example, I may carry on operations on my land which injuriously affect my neighbour provided they do not amount to a nuisance and are of utility to me. Or, as a trader, I may by my energy and skill cause injury to my rivals provided I employ no unlawful means.[2]

In these, and in other cases, there is a reason of public policy in favour of freedom even though damage is caused. But no public policy is in favour of encouraging malicious acts. And, here as elsewhere, there is a degree of negligence so great that the law assimilates it to malice.[3] Proof of malice is, as a rule, difficult to make, and, in general, has to be inferred from the circumstances.

Many French authorities now suggest another criterion. It is urged that a right is created to serve a certain end or purpose, and that it cannot lawfully be exercised in an abnormal way, *i. e.*, in a way contrary to this economic or social purpose for which it exists.[4] According to the expression which has now come into general use in the French law, the malicious or abnormal use of a right is a ground of damages and is spoken of as an abuse of the right.

The general rule that the *normal* exercise of a right cannot render the actor liable in damages was expressly affirmed in a

[1] Dig. 50. 17. 55.

[2] See Pand.-franç. vo. Liberté du Commerce, n. 386. *Cf.* Mogul Steamship Co. *v.* McGregor, [1892] A. C. 25, 23 Q. B. D. 598.

[3] Cass. 11 juin 1890, D. 91. 1. 193.

[4] See Saleilles, Étude sur la Théorie Gén. de l'Obl. 2 ed. p. 371; Charmont, in Revue Trimestrielle, 1902, p. 122.

recent French case. The keeper of a café put up a notice in his establishment, *le café ne sert pas de byrrh.* "Byrrh" is a kind of drink manufactured by a particular firm and patented. The owners of it sued the café-keeper for damages. The Court of Pau held there was no liability. There was no proof of malice, and it could not be inferred merely from the notice. The café-keeper had the right not to sell byrrh, and the right to inform his customers of that fact. The court held that these rights had been exercised in a normal manner.[1]

On the other hand, the principles as to abuse of rights are thus laid down in a recent case: "Rights are limited not only in their extent, but also in their exercise, which is permitted only for certain purposes. There is, therefore, abuse of the right if it is exercised with the intention of injuring another, and, perhaps also, if it is exercised without an interest or without lawful motives. Thus it is a duty not to use one's rights in all their rigour when it is possible to protect one's interest without going to this extremity."[2]

There is now a considerable literature in France upon the subject of *Abus des droits*.[3] The doctrine is not a new one, but it has been much more emphasized in recent years, and has been applied by the courts in very various circumstances. The principle was, however, formulated in admirable terms by Larombière: — "In order that the exercise of a right should guarantee entire and perfect freedom from liability, it is necessary that the person who exercises it should make a prudent use thereof, with ordinary precautions, without abusing it, and without exceeding its just limits. Any abuse which he should make of it which causes damage would render him liable to repair the damage so caused. *A fortiori* he would be liable if, among different ways of exercising his right, he had maliciously, and with the intention of causing injury, chosen that one which must or might cause the most damage. Malice is then more than a fault and it deserves no indulgence."[4]

That the principle is gaining ground is well seen by the fact that

---

[1] Pau, 18 juin 1897, Dall. 97. 2. 335. See Dalloz, Rép. vo. Responsabilité, nos. 101 seq. and Supp. eod. vo. nos. 60 seq.

[2] Trib. Civ. Toulouse, 13 avr. 1905, Dall. 1906. 2. 105.

[3] See Josserand, L., De l'Abus des Droits (Paris, 1905); Charmont, art. in Rev. Trim. 1902, p. 113; Saleilles, Étude sur l'Obligation, 2 ed. n. 310, and notes to D. 1908. 2. 73; Dall. 1906 2. 105; Sir. 1904. 2. 217. For the best criticism see the note by M. Esmein to Sir. 1898. 1. 17.

[4] Obligations, ed. of 1885, art. 1382, n. 11, v. 7, p. 544. *Cf.* Toullier, v. 11, n. 119.

the German Code expressly provides that "the exercise of a right is not permitted when its only object can be to cause injury to another,"[1] and that the draft of the Federal Civil Code of Switzerland declares, "He who evidently abuses his right enjoys no legal protection."[2] As regards the common law the fullest consideration of the question with which I am acquainted is the suggestive article by Mr. James Barr Ames in the HARVARD LAW REVIEW for April, 1905, on the subject, "How far an Act may be a Tort because of the Wrongful Motive of the Actor."

It is, however, in France that the theory has received the most countenance. Most French writers accept the doctrine that an act which is done not for the protection of any legitimate interest, however small, but simply out of the desire to injure another — *nuire à autrui sans profit pour soi-même* — is illegal and entails liability in damages.[3]

It was disputed by some of the older writers.[4] And there are still eminent authorities who deny its soundness.[5] To a considerable extent the disagreement is a question of terminology. It is admitted by almost all French authorities that the number of rights which are absolute is extremely small. Rights are limited in their extent. Instead of saying that such and such an exercise is an abuse of right, it is argued that we should say that the right does not extend to the case in question.

M. Planiol, who entirely condemns the term "abuse of rights," and, contrary to most authorities, will not admit that the legality or illegality of an act can depend on the motive with which it was done, nevertheless approves of most of the decisions of the courts in which the theory of abuse of rights has been applied. He does not dispute the soundness of most of the results reached; but is of the opinion that the judgment should have been rested on the non-existence of the right, or its non-existence to the extent claimed, rather than on a supposed abuse of it. He says, "The new doctrine rests entirely upon a phraseology insufficiently studied: its formula, 'abusive use of rights,' is a logomachy;

---

[1] B. G. B. art. 226.

[2] Art. 3, 2nd alin.

[3] Sourdat, v. 1, n. 439; Proudhon, Usufruit, v. 3, n. 1686; Toullier, v. 2, n. 119; Laurent, v. 20, n. 410. And see note to Cass. 22 juin 1892, S. 93. 1. 51; Pand.-franç. vo. Responsabilité Civile, n. 534.

[4] See *e. g.* Demolombe, v. 12, n. 648.

[5] M. Esmein in note to Cass. 29 juin 1897, Sir. 98. 1. 17; Planiol, Tr. Elém. 4th ed. v. 2, s. 870; Baudry-Lacantinerie et Barde, Oblig. 2 ed. v. 3, n. 2855.

for, if I use my right, my act is *lawful;* and when it is *unlawful* it is because I exceed my right and act without right, *injuria*, as the Lex Aquilia calls it. To deny the abusive use of rights is not to try to make pass as permissible the very various kinds of acts causing damage which have been repressed by the jurisprudence; it is only to make this observation, that every abusive act, by the mere fact of its being unlawful, is not the *exercise of a right*, and that the 'abuse of rights' does not constitute a juridical category distinct from unlawful acts. We must not be cheated by words: *the right ceases where the abuse commences*, and there cannot be an abusive use of any right whatever, for the irrefutable reason that one and the same act cannot be at the same time in *conformity with the law and contrary to the law.* . . .

"At the bottom everybody agrees; only in the cases where certain people say 'there is an abusive use of a right,' others say 'there is an act done without right.'

"The only truth at all new, if indeed it is so, which results from these discussions is that there are considerable and continual variations in the ideas which men form of the extent of their rights. Such and such a right which was formerly considered to be absolute has ceased to be so; such another which used to be subject to few restrictions has seen these restrictions multiplied." [1]

This reasoning has been accepted in some French courts,[2] and it is certainly true that some classes of rights vary with changes in the ideas of the society in which they are exercised. This is the case, for example, with the husband's right of control over his wife. It is hardly open to dispute that at one time a husband was conceived to have the right to chastise his wife in order to enforce obedience. Beaumanoir, writing in 1283, said: *il loit bien à l'homme à batre sa fame sans mort et sans mehaing?, i. e.*, he may beat her short of death and mutilation.[3] And d'Argentré, commenting on l'Ancienne Coutume de Bretagne, art. 423, says: *Maritus retinere et castigare uxorem debet.* And even in the middle of the eighteenth century Dareau writes: *Quand elle s'écarte de ses devoirs, qu'elle les oublie, il est fait pour les lui retracer et en exiger la pratique . . . en un mot, il a la voie de la correction jusqu'à certaines bornes, et pourvu qu'il ne les franchisse pas, il ne fait que son*

[1] Tr. Elém. 4 ed. v. 2, n. 871. The italics are M. Planiol's.

[2] See, *e. g.*, Toulouse, 20 juill. 1896, Dall. 97. 1. 542.

[3] Coutumes de Beauvaisis (ed. Salmon), v. 2, n. 1631. *Cf.* Ancienne Coutume de Bergerac, art. 82.

devoir.[1] And he even says: *Un mari n'est comptable à personne de la manière dont il punit sa femme lorsqu'elle le mérite.*[2] But M. Fournel, his editor, writing in 1785, thinks this goes too far, and says it is only among the lower classes that physical chastisement is tolerated. There has been no legislation limiting the husband's authority, but it is universally admitted that the right of beating a wife no longer exists in France.[3]

The same process can be traced in England. An old writer stated the law then, "The husband hath by law power and dominion over his wife and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner."[4] But such expressions are now characterized by learned judges as "quaint and absurd dicta."[5] What once was a right has ceased to be so, because gentler and more civilized manners have become usual. The right itself has shrunk.

But M. Planiol's reasoning on the general question is, I venture to think, not sound. There is a clear distinction between an act which is an abuse of a right and an act which is done without right. As it has been very well put, "The notion of abuse of a right is connected with the idea of the end aimed at [*le but*]: not only is every right limited in its extent, but in addition, its exercise cannot be allowed for every possible end; there is an abuse if the right is exercised without an interest and without lawful excuse [*sans motifs légitimes*]."[6]

Thus the right of an owner extends to sinking shafts in his land. The land is his *usque ad centrum.* But if he sinks such shafts merely to injure his neighbour, this is to abuse the right of an owner. It is the intention to injure, or the want of a lawful motive, which converts an act otherwise lawful into one which is unlawful. Quite different is the case of the man who has no right. The man who sinks a shaft in his neighbour's land is without any right, and can be restrained whatever may have been the motive.[7]

This general principle of abuse of rights has been applied by the courts in every department of the law. Such questions as to the

---

[1] Traité des Injures, ch. iv, s. 1, n. 2, p. 224.

[2] *Ibid.* ch. iv, s. 1, n. 8, p. 242.

[3] See note to Chambéry, 4 mai 1872, Dall. 73. 2. 129.

[4] Bacon, Abr., tit. Baron & Feme, B. See also Fitzherbert, Nat. Brev. 80; Seymore's Case, Godbolt. 215, 78 Eng. R. 131.

[5] The Queen *v.* Jackson, [1891] 1 Q. B. 671, 679.

[6] M. Tissier in Revue critique, 1904, p. 509.

[7] See the criticism in Josserand, De l'abus des droits, 74.

absolute character of rights are apt to arise under leases. In a lease it is a common stipulation that the tenant shall not sublet to any person unless he is approved of by the landlord. Does this give the landlord an absolute right of refusal without being bound to give any reason?

According to the old law it appears that the court might control the arbitrary refusal of the landlord.[1] But C. C. 1638 (C. N. 1717) says the stipulation against subletting must be strictly observed, and the prevailing view in France is that the landlord's right of refusal under such a clause is an absolute right.[2] In our courts there is some authority to the contrary. In one case it was held that the right of the lessor was not so absolute but that the court had power to weigh his motives, especially when he refused systematically to accept a sub-tenant unless he was paid for consenting.[3]

In the law of status the theory of abuse of right has been applied in several cases.

I have already discussed the case in regard to the husband's right of personal control over the wife. The principle has been applied also to cases relating to the husband's authorization of his wife's contracts and to cases as to a father's right to refuse consent to the marriage of his minor child. The husband has the right to demand the nullity of contracts made by the wife without his authorization.[4] But an abusive exercise of the right will not be permitted.

In a French case a husband and wife, common as to property, had been living apart for a number of years. The wife had been carrying on a series of speculations on the stock-exchange. In these transactions she had passed herself off as an unmarried woman. The husband was aware of what she was doing. Subsequently he brought an action against the brokers with whom his wife had dealt, claiming repetition of sums paid by her for "differences" and pleading that her contracts with them were null as unauthorized. It was held that he could not turn round in this way and take advantage of a fraud which he had facilitated.[5]

---

[1] Pothier, Louage, n. 283.

[2] Baudry-Lacantinerie et Wahl, Louage, 2 ed. v. 1, n. 1104. But see R. T. 1908, p. 305.

[3] David *v.* Richter, 1882, 12 R. L. 98 (Mathieu, J.); Charbonneau *v.* Houle, 1892, 1 S. C. 41 (C. R.). *Contra*, Dorion, J., in Hearn *v.* Dane, 11 R. de J. 232. See Mignault, v. 7, p. 320.

[4] C. C. 183; C. N. 225.

[5] Cass. 8 nov. 1905, Dall. 1906. 1. 14.

In a case here, after a judgment of separation from bed and board a husband demanded the nullity of the sale by the wife of an immoveable on the ground that the sale had not been judicially authorized by him or by a judge.[1] Andrews, J., dismissed the action on the ground of want of interest.[2]

And a plaintiff who seeks to press a claim in which he has no interest is seeking to make an abusive use of his right.

By C. C. 119 (C. N. 148) children who have not yet attained the age of twenty-one years must obtain the consent of their father, or, if he be dead, of their mother, before contracting marriage. The view of most writers is that this is an absolute right enjoyed by the father which cannot be controlled by the court. It is a matter entrusted by the law to his discretion, and the court has no authority to overrule his decision, even though it is averred that his refusal to consent was prompted by pure caprice or by malice.[3] And this view has been followed in one case in our courts where one of the *considérants* was that the paternal authority was a purely personal privilege which could not be exercised by the court in place of the father.[4]

Tradition is, notwithstanding, against the opinion that the father's right is so absolute that the court is not entitled to examine the reasons for his refusal to consent to the marriage. It is clear that in many cases his knowledge of the circumstances, and his interest in the happiness of his child, will give great value to his opinion. The court would be extremely slow to find that the father's discretion had been unfairly exercised. But cases are conceivable in which it might clearly appear that his refusal was against the interest of the child, and, it may be, prompted by actual malice. In such cases it is contrary to justice that the father's authority should be subject to no control, and that he should be able to say with impunity *stet pro ratione voluntas.* In the Roman Law, in spite of its exaltation of the *patria potestas*, the court could examine the motives of the father's refusal and could, if necessary, overrule it.[5] And Pothier thinks a case might be made out for the interference

---

[1] C. C. 210.

[2] Letourneau *v.* Blouin, 1892, 2 S. C. 425.

[3] Baudry-Lacantinerie et Houques-Fourcade, Personnes, 2 ed., v. 2, n. 1483; Planiol, Tr. Elém. 4 ed. v. 1, s. 769; Aubry et Rau, 4 ed. v. 5, s. 462, p. 71; Huc, v. 2, n. 32.

[4] Leveillé *v.* Leveillé, 1895, 1 R. de J. 443 (De Lorimier, J.).

[5] Dig. 23. 2. 19.

of the court, and, on the recommendation of relatives, for dispensing the minor from obtaining a father's consent.[1]

This was the old law of the parts of Germany governed by the civil law.[2] In France and in the law of Quebec the language of the code is so explicit that it appears impossible to admit to the court the power of controlling the father's discretion by giving a consent in his place. But does it follow that if his refusal causes damages he should not be liable in reparation?

This has been considered in two French cases, and in both of them the principle has been admitted that the refusal of the father might, in certain circumstances, be an abuse of right. In the last case, and the only one in which damages were actually given, the father had first consented to the engagement of his minor son. Relying upon this consent, the woman to whom his son was engaged had given up her business, and had removed to the town in which the son resided. The father afterwards withdrew his consent. It was held that he was liable in damages to the woman.[3]

The doctrine of abuse of rights is also applied in France in regard to abusive use of legal proceedings in civil suits. And the law of Quebec upon this subject follows the French.

To bring an action in order to intimidate the other party and to force him to agree to a compromise which is unfair to him amounts to violence, and a contract extorted in such a manner can be annulled. This was held in one case where an action was brought against the captain of a ship on the day before his vessel was due to sail. He was placed in the alternative of paying what was demanded or of delaying the departure of his vessel. The court, being satisfied that the claim was an unjust one and made for the purpose of intimidation, rescinded the compromise to which the captain had agreed.[4]

And a party by his conduct of a case, *e. g.*, in causing vexatious delays, multiplying incidents of procedure, entering an appeal and not appearing, and the like, may shew that the action is vexatious and may be found liable in damages to the other party in addition to expenses.[5]

---

1 Mariage, n. 332.

2 See *Motive zu dem Entwurfe*, etc., v. 4, p. 28. But by the new code it is only an emancipated child who has a right of appeal against the father's refusal. B. G. B. art. 1308.

3 Lyon, 23 janv. 1907, Dall. 1908. 2. 73. See Alger, 9 avr. 1895, Dall. 95. 2. 320.

4 Cass. 19 févr. 1879, Dall. 79. 1. 445. *Cf.* for other cases of abuse of the right of action, Cass. 11 juin, 1890, Dall. 91. 1. 193.

5 Cass. 3 août 1891, Dall. 92. 1. 566; Cass. 26 avr. 1898, Dall. 98. 1. 391; Cass. 20

So also, in France, a newspaper which exceeds the limits of fair comment is said to abuse the right of freedom of the press.[1] And the same term is applied to a person who, being protected by some special privilege or immunity, makes an abusive use of this privilege to turn his speech or writings into a vehicle for the expression of private malice.[2] In the English law it would seem equally correct to say that a statement made maliciously on a privileged occasion was an abuse of the privilege.

The principle has also been applied in regard to the right to strike. In a number of cases in which the right of workmen to strike, or the right of trades unions to call out their men, has been elaborately discussed, it has been settled in France that the right is one which can be exercised only from motives of trade interest. Threats of a strike in order to injure a particular workman, or to put pressure upon him, are as a general rule illegal. They are certainly so if prompted by mere malice. But they might be justified by shewing that the dismissal of the workman was a matter which affected the safety or the collective interests of the strikers.[3]

And, according to recent French authority, even the refusal to contract may in certain circumstances be an abuse of right. In a recent case the Court of Cassation has accepted the principle that a man has not an absolute right to refuse to enter into a contract with another man.[4] An employer, for example, has not an absolute right to say that in future he will not employ any union men. His refusal may be justified if he can shew that it was prompted by business considerations. But if it appears to have been prompted by ill-will against the members of a particular union the employer is liable in damages.[5] This decision has recently been followed in a group of cases.[6] These cases seem to go very far, and I think

juin, 1904, Dall. 1906. 1. 476. So in the law of Quebec also, though in our practice a separate action must be brought for the damages.

[1] Josserand, De l'abus des droits, p. 24. See Cass. 8 mai, 1876, Dall. 76. 1. 259; Cass. 29 juin, 1897, Dall. 97. 1. 537 (the phrase is not employed in the judgments).

[2] See upon "privilege" in the French law, Grellet-Dumazeau, De la Diffamation, v. 2, p. 189; Pand.-franç. vo. Diffamation-Injure, nos. 1181 seq. (des immunités).

[3] Nîmes, 2 févr. 1898, Dall. 98. 2. 103 (group of workmen); Chambéry, 14 mars, 1893, Dall. 93. 2. 192; Cass. 9 juin 1896, Dall. 96. 1. 582. As to what are collective interests see the note in Sir. 1905. 2. 17. See on the subject generally the article by M. A. Wahl in Rev. Trim. 1908, p. 613.

[4] Cass. 13 mars 1905, Dall. 1906. 1. 113.

[5] Trib. de Bordeaux, 14 déc. 1903; Sir. 1905. 2. 17 note.

[6] Trib. Com. d'Epernay, 28 févr. 1906, etc. Dall. 1908. 2. 73.

that our courts would not interfere with the freedom of the individual to such an extent.

It is, however, in connection with the use of property that the doctrine of abuse of rights has been most fully considered, and I will attempt to trace the historical development of the French law upon this matter.

By the Roman law it was clearly laid down that an owner of land had the right to sink wells or make excavations in his land, and if, in so doing, he cut the veins which fed the springs of his neighbour this was not a ground of liability in damages.[1] But this was subject to the limitation that the act must not be merely malicious: — *Marcellus scribit cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem: et sane non debet habere si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit.*[2] But the *onus* of proving malice was on the plaintiff, and, apparently, evidence that the operation was without any obvious utility was not enough to shift this *onus*.[3]

The texts in the Roman law are scanty, and the principle has in modern times been a good deal disputed. It appears, however, to be supported by the balance of authority in the modern civil law, though the difficulty of proving malice has made its application very rare.[4]

The modern German law has followed the same rule. The code declares, generally, " the exercise of a right is not permitted when its only object can be to cause damage to another." [5] There is no doubt that in Germany the building erected purely to damage one's neighbour [*Neidbau*], or the well sunk for the same reason, is unlawful. The expression used in Germany for such malicious abuse of a right is *Chikane*.[6]

The principle that a merely malicious use of property is unlawful was accepted by many writers in the old French law;[7] but is

---

[1] Dig. 39. 3. 21.

[2] Dig. 39. 3. 1. 12. *Cf.* Dig. 6. 1. 38; 39, 2, 26; 50. 10. 3; 8. 2. 9.

[3] See Glück, Serie 39–40, Dritter Theil, p. 241; Windscheid, Pand. 7 ed. v. 1, s. 121, note 3 and s. 169, note 6.

[4] Vangerow, Pandekten, 7 ed. v. 1, s. 297, anm. 2, p. 544; Windscheid *ut sup.* See Nathan, Common Law of S. Africa, v. 3, n. 1507.

[5] B. G. B. art. 226. Cf. art. 826. See Windscheid, v. 1, s. 121, note 3.

[6] See Cosack, Lehrbuch, 4 ed. v. 1. ss. 77, 209; Marcus *v.* Bose, O. L. G. zu Darmstadt, June 5, 1882, 37 Seuff. Arch. n. 292.

[7] Guy-Coquille, Cout. de Nivernais, ch. 10, art. 1; Ferrière, Comm. de la Cout. de Paris sur l'art. 187; nos. 4 & 16 Fournel, Tr. du Voisinage, ed. 1834, v. 2, vo.

generally stated without any development and supported by the passage from Marcellus.

Domat says: — *Celui qui faisant un nouvel œuvre dans son héritage use de son droit, sans blesser ni loi, ni usage, ni titre, ni possession qui pourrait l'assujettir envers ses voisins, n'est pas tenu du dommage qui pourra leur en arriver; si ce n'est qu'il ne fit ce changement que pour nuire aux autres sans usage pour soi. Car en ce cas ce serait une malice que l'equité ne souffrirait point.*[1] And it is generally accepted by modern writers.[2] The jurisprudence is in the same sense.[3] In the French law an owner of land may sink shafts, and make excavations in his land. But to take away his neighbour's lateral support is an abuse of the right of property. And when the soil is specially liable to slide he must take extraordinary means to prevent his neighbour's land from falling.[4] And even when his operations are well within his boundary, so that his neighbour's lateral support is not affected, he must not act merely maliciously.

To cut the veins of a neighbour's spring for no purpose except that of doing him injury is unlawful. In one case two springs of mineral water were separated from each other by only a few yards but were in different properties. The owner of one of them put a hydraulic pump into his spring the effect of which was to draw away the greater part of the water from his neighbour's spring, and to allow this water to run away into the river. It was held that the rule *malitiis non est indulgendum* applied.[5]

In a more recent case of this kind a report by experts was ordered, and they reported that the operations were causing damage to the springs of a neighbour and could not be of any utility to the owner

---

Fumée, p. 131. See Augeard, Arrêts notables (Paris, 1756), v. 2, p. 252, n. 72; and other old cases cited by M. Appert in note to Sir. 1904. 2. 217.

[1] Liv. ii, Tit. viii, Sect. iii, n. 9, also Liv. iii, Tit. v, Sect. ii, n. 17. Sic. Basnage ed. 1709, sur l'art. 606, Cout. de Normandie, p. 490; Pothier, Société, n. 212; Dunod, Prescriptions, 3rd ed., 1774, part. ch. xii, p. 87.

[2] Daviel, Cours d'Eau, v. 3, n. 895; Toullier, v. 3, n. 328; Proudhon, Usufruit, v. 3. n. 1486; Aubry et Rau, 5th ed. v. 2, s. 194, note 19, p. 309; Laurent, v. 6, n. 140; Sourdat, v. 1, n. 439; Note by M. Appert under Trib. de Sedan, 17 déc. 1901, Sir. 1904. 2. 217; Baudry-Lacantinerie et Chauveau, Des Biens, n. 218, 222; Rev. Trim. 1905, p. 465, art. by Marquis de Vareilles-Sommiérès. *Contra*, Demolombe, v. 12, n. 648; Planiol, Tr. Elém. 4th ed. v. 2, s. 870.

[3] Esmein in note to Cass. 29 juin 1897, Sir. 1898. 1. 17. Cass. 20 juin 1842, Dall. 43, 1, 68; Cass. 4 déc. 1849, Dall. 49, 1, 305 (note); Cons. d'Etat, 11 juill. 1879, Dall. 80. 5. 374.

[4] Colmar, 25 juill. 1861, Dall. 61. 2. 212; Pand-franç. vo. Propriété, n. 136.

[5] Lyon, 18 avr. 1856, Dall. 56. 2. 199. Contrast Montpellier, 16 juill. 1866, Sir. 1867. 2. 115, where there was damage but no malice.

of the land on which they were made. This was intimated to him, but the operations were not discontinued. It was held by the Cour de Lyon that this was sufficient proof of malice. And the Cour de Cassation rejected a *pourvoi*.[1]

And in one of the clearest cases on the subject an owner of property had built a false chimney on his roof merely to darken a skylight in his neighbour's roof. The court ordered the chimney to be removed on the following grounds: considering that, if on principle the right of property is a right in a certain sense absolute, entitling the owner to use or abuse the thing, nevertheless the exercise of this right, as of every other, ought to have as a limit the satisfaction of a serious and legitimate interest, and the principles of morality and of equity are opposed to the law giving its sanction to an act inspired by malice, performed under the domination of an evil passion, not justified by any personal advantage to the person acting, and causing serious damage to another.[2]

In another singularly clear case an owner had erected a wooden screen ten feet high within three yards of his neighbour's house. It was held that it must be demolished, seeing that it was shown to have been erected out of malice, and was of no utility to the person who put it there.[3]

Similarly an owner of property is allowed to make noises thereon in a normal manner unless they are so intolerable as to amount to a nuisance. But he is not entitled to post his servants along the limits of his property with noisy instruments in order by an organised disturbance to frighten the game on his neighbour's land and spoil his shooting.[4] In a somewhat similar case in England the scaring away of a neighbour's game with fireworks was held actionable as a nuisance.[5]

And in several French cases it has been held that an owner of property who allows game or, especially, rabbits to breed in large numbers, and does not take reasonable means to keep them down, is liable for damages done by them to his neighbour's crops.[6] There

---

[1] Cass. 10 juin 1902, Dall. 1902. 1. 454. [2] Colmar, 2 mai, 1855, Dall. 56. 2. 9.

[3] Trib. de Sedan, 17 déc. 1901, Sir. 1904. 2. 217, where see the learned note by M. Appert.

[4] Paris, 2 déc. 1871, D. 73, 2, 185. Dall. Supp. vo. Chasse, n. 1341.

[5] Ibbotson *v.* Peat (1865), 3 H. & C. 644. See Carrington *v.* Taylor (1809), 11 East 571, 11 R. R. 270, and Keeble *v.* Hickeringill in the note. See Pollock, Torts, 7 ed., 329. *Secus* as to preventing rooks from resorting to a neighbour's trees, Hannan *v.* Mockett (1824), 2 B. & C. 934, 26 R. R. 591.

[6] Cass. 14 mars 1905, Dall. 1905, 1. 270.

is in France a great body of jurisprudence on this point, and the principle has been applied to damage done by deer, hares, wild boars, foxes, wolves, badgers, and even pheasants and partridges.[1]

A distinction is made between wild animals kept in an immoveable specially set apart for them, such as bees, pigeons kept in a dove-cot, or rabbits kept in a warren,[2] and wild animals which are in a state of freedom.[3]

And it is the view of most writers that when wild animals are kept in an enclosure surrounded by walls or palisades which do not allow them to escape, they fall under the same rule as the rabbits in a warren or the doves in a dove-cot. Their owner is responsible for damage done by them without proof of fault on his part. His liability is governed by C. C. 1055 (C. N. 1385).

But in the case of the wild animals which are free to roam over the country the liability of the owner of the land on which they breed depends upon fault.[4] It must be shewn that he favoured their multiplication, or failed to take reasonable measures to keep them down. So long as they are kept within moderate limits there is no liability, even though they cause a certain amount of damage.[5]

In England the law is in an unsatisfactory state. It was held in one case by a Divisional Court that an action would lie against a person overstocking land with game so as to cause damage to a neighbour.[6] Pollock, B., said this was not so much negligence as an infraction of the rule: *sic utere tuo ut alienum non laedas.* But in an old case it was decided that "if a man makes coney-boroughs in his own land which increase in so great number that they destroy his neighbour's land next adjoining, his neighbour cannot have an action, for so soon as the coneys come on his neighbour's land he may kill them, for they are *ferae naturae* and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coneys do in which he had no property, and which the other may lawfully kill."[7]

But in the French law and the law of Quebec rabbits in a warren are private property (C. N. 564; C. C. 428).

Mr. Beven distinguishes Boulston's case from the case of Farrer

---

[1] See Dall. Supp. vo. Chasse, nos. 1346 seq. Rép. eod. vo. n. 196.

[2] See C. C. 428.

[3] Dall. Supp. vo. Chasse, l. c.

[4] *Ibid.* n. 1354.

[5] Req. 24 déc. 1883, D. 84. 5. 431, D. Supp. Chasse, n. 1350.

[6] Farrer *v.* Nelson (1885), 15 Q. B. D. 258.

[7] Boulston's Case, 5 Co. 104b., 77 Eng. Rep. 216.

on the ground that in the latter the game was brought to the land, whereas in the former the rabbits were naturally there and were merely harboured.[1] This seems a distinction which should not in principle affect the liability. Our courts would probably follow the French law on the subject.

Where malice is not alleged, cases regarding the uses of property which are forbidden to an owner as amounting to an interference with the equal rights of his neighbours are in our law grouped under the head of nuisance. In France such cases are often given as examples of the abuse of the right of property — *un usage abusif de son immeuble*.[2] Cases where an owner of property has demanded the suppression of certain works erected by his neighbour contrary to some provision of law but not causing any damage to the plaintiff, have been referred to the same principle.[3] A similar question arises when an owner in building upon his land innocently encroaches, it may be by only a few inches, upon the land of his neighbour of which he had not previously been in possession. Can the neighbour insist on his pulling down his house?

In one French case, where it was only the foundations of a building which encroached and no damage was caused, the Court of Limoges refused to order demolition or to award damages.[4] In most cases the question is complicated by considerations of the good or bad faith of the builder, and, where he is in good faith, there will generally have been such acquiescence on the part of the neighbour as will bar his claim for demolition. He will have to be satisfied with payment of a reasonable indemnity for his land which has been occupied.[5] But where the circumstances do not lead to any inference of acquiescence, as, *e. g.*, when the owner whose land was encroached upon was absent, and did not know anything about the building, can he claim that he has become owner by accession of the part of the building which stands upon his land or can he compel its demolition?

It has been suggested that such claims might be met by the defence that they were abusive.[6] Demolombe cites some old cases on the subject to the effect that when no acquiescence was

[1] 1 Negligence, 3 ed., 524.

[2] See Limoges, 5 févr. 1902, Dall. 1902. 2. 95.

[3] See note by M. Appert to Sir. 1904. 2. 217 at p. 218, 2nd col.

[4] Cass. 28 oct. 1891, Dall. 92. 1. 285.

[5] Delorme *v.* Cusson, 1897, 28 S. C. R. 66; Dansereau *v.* Dansereau, 1906, 29 S. C. 411 (C. R.) See Baudry-Lacantinerie et Chauveau, Des Biens, n. 377.

[6] See M. Charmont, in Rev. Trim. 1902, p. 117.

proved demolition must be ordered if demanded.[1] M. Planiol thinks that if the builder was in good faith, the demolition cannot be claimed. They are improvements made by a possessor in good faith, and become the property of the owner of the land on which they were made subject to his paying the cost or the plus-value.[2]

But as he can choose between these, and as the encroachment will probably have diminished rather than increased the value of his land, this solution is far from satisfying the equities of the case. The German code has an article on the subject: "When an owner in erecting a building has exceeded the boundary of his land, without intention or gross negligence, his neighbour must suffer the encroachment unless he have protested against it before the transgression of the boundary or immediately after. He is entitled to an indemnity in the shape of a rent. The amount of this rent must be fixed with regard to the date of the encroachment."[3] And the owner entitled to this rent can claim, at any time, that the owner of the building shall take over the land occupied by it and pay its value at the time of the encroachment.[4]

In England it seems to be settled that an owner can make with impunity a malicious use of property. In the leading case the headnote is, "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious."[5] This case followed an earlier judgment of the House of Lords to the effect that an owner has a right to sink wells even though this should cut the veins of his neighbour's springs.[6]

In that case Lord Wensleydale says the English law on the question of malicious use of property is different from the civil law. "The civil law deems an act, otherwise lawful in itself, illegal if done with a malicious intent of injuring a neighbour, — *animo vicino nocendi*."[7]

It is worth observing that in neither of these cases was there any proof of malice. In Chasemore *v.* Richards the well was sunk to supply water to a town, and in Mayor of Bradford *v.* Pickles the motive was, apparently, to compel the corporation whose reservoir

---

[1] v. 9, n. 691 *ter*. p. 657.
[2] Tr. Elém. 4 ed. v. 1, n. 2735.
[3] B. G. B. art. 912.
[4] Ib. art. 915. See Cosack, Lehrbuch, v. 2, p. 154.
[5] Mayor of Bradford *v.* Pickles, [1895] A. C. 587, [1895] 1 Ch. 145.
[6] Chasemore *v.* Richards (1859), 7 H. L. C. 349. [7] *Ibid.* at p. 388.

was fed by springs under Mr. Pickles' land to buy his land in order to preserve the supply.

But in England it seems to be accepted that the legality of the exercise of a positive right is not to be tested by asking with what motive it was done.[1] But the positive right may be a right for certain purposes only. Thus, where a person has a right to enter on land only for certain purposes his use of the land for other purposes will make him a trespasser.

In England the soil of the highway is, as a general rule, vested in the owners of the land through which it runs. The public right is merely a right of passage. So a man who stationed himself on a highway, which crossed a moor, for the purpose of using it to interfere with the shooting by preventing the grouse from flying in a particular direction was held to be a trespasser.[2]

In America the decisions are extremely inconsistent on the question of the legality of the malevolent draining of springs or erection of spite-fences. In some states these malicious acts are prohibited by statute.[3] In a large number of cases it has been held that rights of ownership are not to be exercised for mere malice.[4] But in many others the rule is followed that unless the act itself is illegal no question can be entertained as to the motive with which it was done. Thus in a New York case the defendant dug a ditch through an embankment which surrounded a spring upon his own land, not for his own benefit, but with the intent to divert the water from the plaintiff's well. It was held by the Court of Appeals that there was no cause of action, and the intent was immaterial.[5]

Mr. Ames argues against the doctrine of absolute rights and says "there are many limitations upon the right of ownership at common law, and, it is submitted, there is no difficulty in principle in limiting an owner's right so far that he shall not be permitted to use his land in a particular way with no other purpose than to damage his neighbour."[6]

---

[1] See Capital & Counties Bank *v.* Henty (1882), 7 App. Cas. at p. 766, per Lord Penzance; Allen *v.* Flood, [1898] A. C. 1 H. L.

[2] Harrison *v.* Duke of Rutland, [1893] 1 Q. B. 142 (C. A.). Followed in Hichman *v.* Maisey, [1900] 1 Q. B. 752 (C. A.).

[3] See 12 Am. & Eng. Encyc. L., 2 ed., 1058; 21 *ibid.* 688.

[4] Greenleaf *v.* Francis (1836), 18 Pick. (Mass.) 117; Wheatley *v.* Baugh, 25 Pa. St. 528; Chesley *v.* King, 74 Me. 164.

[5] Phelps *v.* Nowlen (1878), 72 N. Y. 39. *Cf.* Walker *v.* Cronin (1871), 107 Mass. 555. See cases on both sides in Gould, Waters, 3 ed., § 290, and in article by Mr. J. B. Ames in 6 HARV. L. REV. 414.

[6] *Ibid.*

It is, however, not only in regard to uses of property that the English law is more inclined than is the French to admit the absolute character of legal rights.

The doctrine of abuse of rights appears to be firmly established in France, and most if not all of the practical applications which have there been made of it would be followed in the law of Quebec.

In England, on the contrary, there are decisions in many branches of the law which clearly affirm the absolute character of legal rights, irrespective of the motives of the person who enforces them or of his want of legitimate interest. This is so in the case of rights of property, as has just been explained. It is so also in regard to the right to bring a civil suit. In the words of Bowen, L. J., "the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."[1] The plaintiff in such a vexatious or malicious suit cannot even be condemned to pay the defendant's "extra costs." He is only liable to pay the taxed costs as between party and party.[2]

Criminal prosecutions, proceedings in bankruptcy against a trader or petitions for the winding up of a company are subject to a different rule because they involve a blow to reputation or credit.[3]

So a count for distraining for more rent than was due is bad, though it was alleged to be done maliciously.[4] And in England the truth of defamatory words spoken or written is, if pleaded, a complete defence to a civil action for libel. The words may have been uttered maliciously and may have caused damage, but nevertheless, they are not actionable.[5]

In the law of Quebec the defence is not absolute. There must be public interest as well as truth to justify the uttering of the defamatory words.[6]

In a number of the American states there are statutes which provide that in actions for libel the truth is a complete defence only when it was published with good motives and for justifiable ends.[7]

---

[1] Quartz Hill Gold Mining Co. *v.* Eyres (1883), 11 Q. B. D. 674, at 690.

[2] *Ibid.*

[3] See Pollock, Torts, 7 ed., 311.

[4] Stevenson *v.* Newnham (1853), 13 C. B. 285, 93 R. R. 532.

[5] See Odgers, Libel and Slander, 4 ed., 173.

[6] See Trudel *v.* Viau, 1889, M. L. R. 5 Q. B. 502; Jeannotte *v.* Gauthier (1897), 6 Q. B. 520.

[7] See a list of these states in 25 Cyc. 414.

And there are dicta of eminent judges in England which seem to lay down as a general principle that the legality of an act is by English law to be considered as not depending upon the motive with which it was done. It was said by Parke, B., "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."[1] And in the great case of Allen *v.* Flood there are important dicta to the same effect. Lord Watson said, "The existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due."[2] And Lord Davey said, "it humbly appears to me to be against sound principle to hold that the additional ingredient of malicious motive should give a right of action against an individual for an act which if done without malice would not be wrongful although it results in damage to a third person." And Lord Macnaghten laid down the same general rule.[3] But in spite of the high authority of the judges who expressed these opinions their soundness is open to serious question.[4]

There may be classes of cases in which from considerations of public policy the English law will not permit any inquiry into motives. The absolute rights of the landowner, the right of bringing a civil suit and the cases in the law of libel in which there exists an absolute privilege, such as that enjoyed by a legislator or a judge, are familiar examples.

On the other hand, there are other cases in which the motive makes all the difference between lawfulness and unlawfulness. This is so in malicious prosecution, in libel where there is a qualified privilege, in interference with business, and in inducing breach of contract, or in preventing a man from obtaining employment. A trader may ruin his rival by fair competition, but to carry on a business for no profit to himself but solely to ruin his rival would be unlawful.[5]

A trade-union may call out men on strike for a legitimate trade

---

[1] Stevenson *v.* Newnham (1853), 13 C. B. 285, 93 R. R. at 537.

[2] [1898] A. C. at 92. *Ibid.* at 172.

[3] *Ibid.* at 151.

[4] See, especially, the article by Mr. Ames, "How far an Act may be a Tort because of the Wrongful Motive of the Actor," in 18 HARV. L. REV. 411.

[5] Tuttle *v.* Buck, 119 N. W. 946 (Minn.). See Lord Coleridge in Mogul Co. *v.* McGregor, 21 Q. B. D. at 553; Lord Bowen, *ibid.* at 618; Lord Morris, S. C., [1892] A. C. 49; Lord Field, S. C. 52. In America; Walker *v.* Cronin (1871), 107 Mass. at 564, and cases cited by Mr. Ames in 18 HARV. L. REV. 420. *Contra*, Nat. Assurance Co. *v.* Cumming (1902), 170 N. Y. 315, 326.

interest. But to threaten to strike if a particular workman is employed in order to put pressure upon him is unlawful.[1]

Instead of saying that malice will not make a lawful act unlawful, is it not truer to say that wilful damage done to another is actionable unless there is some just cause or excuse for it? This was said to be a general rule of English law by Bowen, L. J.: "At common law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse."[2] And Holmes, J., delivering the opinion of the Supreme Court of the United States, stated the same rule more fully: "It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. . . . If this is the correct mode of approach, it is obvious that justifications may vary in extent according to the principles of policy upon which they are founded, and while some, for instance, at common law, those affecting the use of land, are absolute . . . others may depend upon the end for which the act is done."[3]

If this is, as Holmes, J., calls it, "the correct mode of approach," the difference between the English and the French law on the subject may be less wide than might at first appear.

F. P. Walton.

McGILL UNIVERSITY, MONTREAL.

---

[1] Giblan *v.* Nat. Amal. Labourers' Union, [1903] 2 K. B. 600 (C. A.). Nat. Assurance Co. *v.* Cumming, *ut sup.*

[2] Skinner & Co. *v.* Shew & Co., [1893] 1 Ch. at 422.

[3] Aikens *v.* Wisconsin (1904), 195 U. S. 194, 204, referring to Moran *v.* Dunphy (1901), 177 Mass. 485, 487; Plant *v.* Woods (1900), 176 Mass. 492; Squires *v.* Wason Manufact. Co. (1902), 182 Mass. 137, 140, 141. See L. Quart. Rev., 1906, p. 118; Pollock, Torts, 7 ed., 319.